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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

GARY D. MAYNARD, WARDEN,

Petitioner,

v.

CLIFFORD HENRY BOWEN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1986

QUESTIONS PRESENTED

1. Whether information regarding a discarded suspect (Lee Crowe) may be exculpatory within the meaning of Brady v. Maryland, in the face of uncontested state court findings of historical fact that:

A. The defendant was positively identified at the scene of the triple murders by two eye-witnesses and no other person, including the discarded suspect, was seen at the scene of the crime;

B. That the two witnesses identified the defendant in a photographic lineup containing the discarded suspect and both witnesses stated that the discarded suspect was not the individual whom they had seen on the night of the triple homicide;

C. An in-person lineup was also held and the defendant was positively identified by both witnesses;

D. There was no showing that the discarded witness participated in the offense.

2. Whether the federal court below improperly denied the presumptive correctness of state court findings of fact that no request for exculpatory material had been made by finding state's counsel had "conceded" such a request in the face of statements by counsel that it was the state's position that no such request had been made.

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The Petitioner, Gary D. Maynard, Warden of the Oklahoma State Penitentiary, by and through the Attorney General of the State of Oklahoma, Michael C. Turpen, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this matter.

OPINION BELOW

The decision of the United States Court of Appeals for he Tenth Circuit for which this petition is sought has been

designated for publication but is not yet reported. The style and the court below was Clifford Henry Bowen v. Gary D. Maynard, Tenth Circuit Court of Appeals No. 86-1136. The opinion for which review is sought was rendered on June 25, 1986. The Petitioner warden filed no petition for rehearing in the court below. The text of the Order of the United States District Court for the Western District of Oklahoma which granted Mr. Bowen a Writ of Habeas Corpus is attached as Appendix A and the Opinion of the Tenth Circuit for which review is sought is attached hereto as Appendix B.

JURISDICTION

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28 U.S.C. § 2254(d) states:

In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit -

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstance respectively set forth in paragraphs numbered

(1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

STATEMENT OF THE CASE

This is an appeal from a judgment of the United States Court of Appeals for the Tenth Circuit affirming the grant of a writ of a habeas corpus to Clifford Henry Bowen. Mr. Bowen was convicted of three counts of capital murder in the District Court of Oklahoma County, Oklahoma. The Oklahoma Court of Criminal Appeals affirmed the conviction. Bowen v. Oklahoma, 715 P.2d 1093 (Okl.Cr.App. 1984). This court denied certiorari. Bowen v. Oklahoma, 105 S.Ct. 3537 (1985). Thereafter, Mr. Bowen sought a Petition for Writ of Habeas Corpus from the United

States District Court for the Western District of Oklahoma. The Honorable Thomas R. Brett granted that writ in an order which attached hereto as Appendix A. Upon the state's appeal, the United States District Court for the Tenth Circuit affirmed in an opinion attached hereto as Appendix B.

STATEMENT OF THE FACTS

For the convenience of the Court, we have divided our presentation of the facts into several segments corresponding with the proceedings had in the courts below.

A. Trial of the Defendant for Murder

References to transcript pages in this section refer to the transcript of Petitioner's trial for murder which was had in the District Court of Oklahoma County, Oklahoma, on March 9-13, 1981. Hereafter, Mr. Bowen shall be referred to as the Defendant.

On July 5, 1980, during the evening hours, a group of guests at the Guest House Inn assembled by the pool. Mary Chilton, a night office clerk at the motel, worked until 10:00 p.m., and then joined her friends at pool side (Tr. 289). Later that evening, she notice a man who was not a guest at the motel (Tr. 292), standing at the concession stand, leaning upon the candy machine (Tr. 311). It was part of her duties to keep intruders off the premises (Tr. 292).

Harold Behrens, co-defendant of the Mr. Bowen and one of the individuals at pool side, placed his hand upon the shoulder of Ray Peters, who is one of the decedents, said "see you tomorrow," and left via the concession area (Tr. 294). Such physical contact upon parting company was not Behrens' normal practice (Tr. 422). Then, Mary Chilton also left by way of the concession area. This area is very well lit by floodlights from the

roofline (Tr. 234, 312), lights on the ceiling of the vending machine area (Tr. 232, 298-99), and light from the vending machines themselves (Tr. 237). All of the above-mentioned lights were on (Tr. 298). Mary Chilton walked within three feet of the man and looked right at him (Tr. 295). She had no trouble seeing the Defendant's face (Tr. 299). In addition, Mary Chilton had a good view of the Defendant when she was sitting at the pool side (Tr. 308). She gave an accurate description of the Defendant's height, weight, and physical stature (Tr. 307). The Defendant had a pale complexion (Tr. 317). This was substantiated by others (Tr. 355). Mary Chilton "memorized" the Defendant's face (Tr. 13), and there was no doubt in her mind that the Defendant was the man that she saw at the concession stand (Tr. 293, 295, 326).

Carrie Pitchford, her husband, and her daughter also were pool side (Tr. 331). The family left the pool area at 1:30 a.m. and went to their room (Tr. 332). While her husband and her daughter went to bed immediately, Carrie did not. She thought about going back out and twice looked out the window to see if any of the women were still by the pool (Tr. 333). She looked out a third time and saw a large, pale complected man, subsequently identified as the Defendant, leaning upon a machine at the concession stand (Tr. 335). The Defendant looked straight up at Carrie Pitchford so that she could see his full face (Tr. 336). She viewed the Defendant for "one full minute or more." (Tr. 354.) The lighting was very good; it was similar to a stage (Tr. 339, 349). Carrie Pitchford had not been drinking that evening (Tr. 343). She had no trouble seeing the Defendant's features (Tr. 339), and

there was no doubt in her mind that the Defendant was the man whom she had seen that evening (Tr. 336). As soon as Carrie laid down, she heard gunfire, jumped up, and saw one of the decedents slump in his pool side chair (Tr. 337).

The manager of the motel noticed an individual in the concession area (Tr. 359). The description of the individual and his attire were substantially the same as the description given by other witnesses. The manager also saw a car with someone sitting in it (Tr. 360). The manager and his wife heard "firecrackers" and then noticed an individual, with a red cap in his hand, shooting a gun (Tr. 361). The manager summoned the police (Tr. 363). As this was being done, a car exited the motel parking lot at a high rate of speed (Tr. 364).

When the police arrived, they found three men sitting at a pool side table, all of whom had at least two gunshot

wounds (Tr. 209). Six .45 caliber spent casings were found, as well as one lead projectile (Tr. 210). At 2:30 a.m., photographs of the scene were taken, and the lighting of the premises, with the assistance of two flashlights, was adequate with which to take photographs (Tr. 220). There were floodlights upon the roofline (Tr. 234), lighting upon the ceiling of the vending machine area (Tr. 232), lighting from the vending machines themselves (Tr.237), and lighting from the motel sign (Tr. 237). The lighting was so good that the photographer stated that "I could load my camera, read my settings, read the tape measure" (Tr. 235).

On July 6, an autopsy was performed upon all three bodies. The death of Ray Peters was caused by two gunshot wounds to the head which resulted in extensive lacerations and a brain hemorrage (Tr. 251). Loose gunpowder was found upon the

body; therefore, the gun was discharged within two feet of the body (Tr. 252). Lawrence Evans had three gunshot wounds inflicted by hollow point bullets (Tr. 256-57). The cause of death was the wounds (Tr. 260). Marvin Nowlin had two gunshot wounds which caused his death (Tr. 268). Pathological symptoms of drug use were found in Peters and Nowlin (Tr. 271). All of the cartridges were fired from the same gun (Tr. 279). Hollow point bullets were used to caused greater damage upon impact (Tr. 283).

In an effort to connect Harold Behrens, a co-defendant, with the Defendant and to provide a motive, the testimony of two additional witnesses was introduced. In 1975, David McBride supervised the organized crime detail of the Oklahoma City Police Department. Harold Behrens, an ex-police officer, was assigned to participate in the surveillance of Jerry Ray James and the

Defendant (Tr. 405). During the later stages of the investigation, Harold Behrens resigned from the police department (Tr. 408). Immediately after the resignation, Jerry James and the Defendant disappeared from Oklahoma City (Tr. 409).

Jack Zumwalt testified that he lived with and was lover of Harold Behrens (Tr. 421). Harold Behrens made his living selling drugs and supported Jack Zumwalt while they lived together (Tr. 421). It was not the custom of Harold Behrens to have physical contact with people upon parting their company, as he had done on the early morning hours of July 6 (Tr. 422). Ray Peters worked for Harold Behrens as a drug dealer (Tr. 423). In June, Ray Peters had been arrested in Pauls Valley, Oklahoma, for driving under the influence and drug charges. Harold Behrens was afraid that Ray Peters would become an informant (Tr. 424). After

Jack Zumwalt heard of Ray Peters' death, he asked Harold Behrens why Ray Peters and not Jim Powell, another drug seller. Harold Behrens replied, "because we need Jim." (Tr. 425.)

An arrest warrant was issued for the Defendant, and Officer Cook went to Tyler, Texas, to serve it (Tr. 432). The Defendant was advised of his rights (Tr. 433). The Defendant was questioned about a number of people, but when he was asked if he knew Harold Behrens, he glanced down and said no (Tr. 436).

The Defendant presented an alibi defense. He presented numerous witnesses who claimed that on the evening in question, the Defendant was at a rodeo in Tyler, Texas. The Defendant took the stand in his own behalf and admitted that he had two prior felony convictions (Tr. 546). He claimed that on July 5, he was not in Oklahoma City (Tr. 549). He claimed that he has made his living since

1971 by gambling and supplemented that income through the purchase and sale of jewelry and real estate (Tr. 548, 522). The Defendant stated that he had psoriasis and was told to get as much sun as possible to remedy the malady, and consequently, that he had a suntan (Tr. 549). The Defendant further alleged that he knew nothing about guns (Tr. 552).

Officer Harrison was called to testify for the defense. The officer stated that Mary Chilton initially identified a photograph of another, namely William Simmons, as the assailant. The officer attempted to secure an arrest warrant for Simmons. Upon cross-examination of Officer Harrison, he revealed that Mary Chilton never made a positive identification of Simmons as the assailant (Tr. 654), and that at an in-person lineup, Mary Chilton said that Simmons looked like the man but definitely was not him.

The State produced rebuttal witnesses. The arresting officer stated that upon arrest the Defendant was light-complected and did not have a tan (Tr. 575-76). This was confirmed by other witnesses (Tr. 580, 583). It was also revealed that there is an airstrip within four minutes of the rodeo where the Defendant allegedly was (Tr. 577), and that a flight from Tyler, Texas, to the Oklahoma City downtown airpark would only take between 30-35 minutes (Tr. 581). Records of in and out flights are not kept, and less than one tank of gas would be required for the round trip. It is only 13 minutes from the Guest House Inn to the downtown airpark (Tr. 584), so that the entire trip would take less than one hour.

Williams Simmons testified. He is only 5'8" and 180 pounds, which is a much smaller frame than the one on the assailant (Tr. 593). To rebut the pre-

sumption raised by the Defendant that he knew nothing about guns, it was revealed that on July 7, 1977, in Plano, Texas, a search warrant was procured for a home in which the Defendant resided along with his wife and another (Tr. 587). The Defendant was arrested and a search uncovered an arsenal of weapons (Tr. 587-88).

The Defendant was found guilty of three counts of Murder in the First Degree. After the second stage of trial, the jury determined that three aggravating circumstances existed and set the punishment for each count at death.

B. Proceedings on Second Motion for New Trial, September 29-30, 1983

On September 29-30, 1983, after an extraordinary remand from the Court of Criminal Appeals, the state trial court, the Honorable Raymond Naifeh presiding,

conducted a hearing which was in part on the issue of the alleged suppression of exculpatory evidence. A transcript of 304 pages was produced by this hearing. At the conclusion of the hearing, Judge Naifeh filed a set of Findings of Fact and Conclusions of Law with the Court of Criminal Appeals. Certain pertinent parts of those Findings of Fact are set out below. In addition, after the Findings of Fact set out below testimony in Judge Naifeh's Court on certain points is set out. Transcript page references in this subsection are to the transcript of the September, 1983, hearings.

FINDINGS OF FACT

1. That no motion for discovery of exculpatory evidence was filed by trial defense counsel on behalf of the Defendant.

2. That no perjured testimony was used to secure the conviction.

3. That the defendant, Clifford Henry Bowen, was positively identified by two (2) eyewitnesses as present at the scene of the crime. No other person, including Lee Crowe, was seen at the scene of the crime.

4. That the two (2) witnesses identified the defendant in a photographic array which consisted of a total of ten (10) photographs (two five-photo spreads).

5. That a photograph of Lee Crowe was in the photographic array and both witnesses stated that Lee Crowe was not the individual whom they had seen on the night of the triple homicide.

6. That an in-person lineup was held and the defendant was positively identified by both witnesses.

7. That the police were aware that Crowe was a suspect but discredited the lead after an intensive investigation which led to the identification of

Clifford Henry Bowen by two (2) eyewitnesses.

8. That while the police were aware that Lee Crowe was in the State of Oklahoma at the time of the triple homicide, there was no showing that he had participated in the offense.

28. That the information regarding Crowe could have been discovered through the exercise of due diligence as the defendant could have requested a list of all suspects prior to trial but failed to do so. (Emphasis added.)

The following testimony was also given in Judge Naifeh's Court. Transcript pages refer to the transcript of the hearing of September, 1983. The Texas Rangers and other police agencies in Texas as well as intelligence units for the Oklahoma City Police Department had reported to Oklahoma City Police that Mr. Bowen was a hit man for the Dixie Mafia. (Tr. 143). One of the Assistant

District Attorneys handling the murder case had received information from the Regional Organized Crime Information Center dealing with Mr. Bowen's reputation for being a hit man, for using a .45, wearing a ball cap, being a residential robber or burgler. (Tr. 247, 250). The scene witness Mary Chilton's attention was specifically directed to Lee Crowe's photograph in the array. (Tr. 157). When Mary Chilton looked at Bowen's photograph she began to tremble. (Tr. 175). Mrs. Chilton was asked again if there was any possible way that Lee Crowe's photograph could be of the shooter. (Tr. 292). The police usually asked witnesses looking at photographs to look at the person, not the hair, or mustaches, because these things could be changed. (Tr. 291). The officer testifying in Judge Naifeh's Court did not recall the exact words on such questions with Mary Chilton. (Tr. 292).

Counsel for Mr. Bowen was aware as early as September, 1983, that some authorities in South Carolina considered Lee Crowe to be a hit man as indicated by cross-examination in Judge Naifeh's Court. (Tr. 275-76).

Lee Crowe's alibi for the night of the murders was not confirmed until 1983 when police officers went to the Mansville, Oklahoma area to talk with C. B. Forguson at whose home Crowe and Patsy Peters were staying. (Tr. 293, 296).

C. FINDINGS OF OKLAHOMA COURT OF CRIMINAL APPEALS

In its review of the case, after receiving Judge Naifeh's Findings of Fact and Conclusions of Law, the Oklahoma Court of Criminal Appeals also found that Mr. Bowen had made no request for exculpatory evidence prior to trial. In doing so, the Court of Criminal Appeals used the following language:

> Appellant asserts the suppression of the allegedly

> exculpatory evidence regarding these suspects denied him due process of law under the authority of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). However, as appellant recognizes, no request was made for exculpatory evidence prior to trial (emphasis added).

Bowen v. State, 715 P.2d 1093, 1098 (Okla. Crim. App. 1984). In the same vein, the Court of Criminal Appeals went on to state:

> The district court made a thorough and exhaustive order in this matter. It found that the information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so. Also, the district court noted that the appellant failed to show under what theory of evidence law that the rumors, suspicions and innuendos concerning Crowe would have been admissible in the trial of the case. Further, the district court correctly found that the mere possibility that an item of undisclosed information might have helped the defense or might have affected the outcome of the trial, does not establish materiality. 22 O.S. 1981, § 1952 (Seventh) (Emphasis added).

Id. 715 P.2d at 1103.

D. PROCEEDINGS IN FEDERAL DISTRICT COURT

The United States District Judge who originally granted Mr. Bowen the writ, the Honorable Thomas R. Brett, acknowledged that Judge Naifeh made a specific finding that there was no request for exculpatory evidence using the following language and a colloquy with the undersigned counsel:

> THE COURT: He made a specific finding there was no such request, and when you gentlemen conceded before me there was such an oral request, that kind of lays that matter to rest, at least insofar as that being a fact.
>
> . . .
>
> MR. NANCE: Thank you, Your Honor. I have not seen a transcript of our previous hearing. I don't recall saying that but if -- and I certainly didn't intend to say it if I did, but I'll not argue with you on that because I think that would be fruitless at this point (Emphasis added).

Transcript, p. 15-16 of proceedings on hearing on Motion to Stay, January 23, 1986.

E. PROCEEDINGS IN THE COURT BELOW

However, in light of these findings, Court of Appeals below stated that it was unclear whether either the State trial court or the Court of Criminal Appeals implicitly decided that no informal, oral request had been made. Slip op. at 28, Bowen v. Maynard, No. 86-1136, slip op. at 28 (10th Cir. June 25, 1986). The Court of Appeals did state that if either State court did find no request of any kind had been made, that finding would be one of historical fact and entitled to the presumption of correctness under 28 U.S.C. § 2254(d). Id., slip op. at 28.

Both federal courts below dealt with the statutory presumption of correctness by finding that counsel for

the state had conceded a pretrial request for other suspects. Bowen v. Maynard, No. 86-1136, slip op. at 30-36 (10th Cir. June 25, 1986). The courts below found this concession over our repeated objections, our continued and repeated reliance upon Judge Naifeh's Findings of Fact, our argument that the federal court should take no more testimony on the question of exculpatory evidence, and the following colloquy with the United States District Court during the closing arguments:

> MR. NANCE: I kept trying to argue that it was irrelevant to whether or not defense could have used that for some purpose, the Crowe material. They probably could. But that's not the constitutional standard that we have to give anything they might use, they might find useful or interesting to know.
>
> THE COURT: Well, that's certainly true if there is no request made. Right?
>
> MR. NANCE: Yes, sir, it is. Even if there is a request made, I think the fact that it

> might be helpful doesn't matter either. You could request everything in there, piece by piece, point by point, that might conceivably be helpful and I don't think there would be any duty to disclose the bulk of that kind of thing.
>
> It is obviously of substantial value to the defense? The example, I think from Footnote 18, [of U.S. v. Agurs, 427 U.S. 97 (1976)] without a specific request, his fingerprints that say your man didn't do it. That kind of thing. Our view is and continues to be at this point that there was no request. And we'll brief the question we discussed earlier.

Transcript 50-51, Closing Statements, October 17, 1985. (Emphasis added). Despite recognizing this exact language, the Court of Appeals went on to find that the State had conceded that there had been a pretrial request for exculpatory evidence. Bowen v. Maynard, No. 86-1136, slip op. at 31 (10th Cir. June 25, 1986).

REASONS FOR GRANTING THE WRIT

PROPOSITION I

THE FEDERAL COURTS BELOW IGNORED UNCHALLENGED STATE FINDINGS OF HISTORICAL FACT TO REACH THEIR DESIRED RESULT AND CONCLUDE THE LEE CROWE MATERIAL WAS EXCULPATORY.

A. STATE COURT FINDINGS OF FACT

As shown above, the original state court trial judge, the Honorable Raymond Naifeh, on extraordinary remand from the Oklahoma Court of Criminal Appeals conducted an evidentiary hearing and made certain findings of fact and conclusions of law. These findings of fact include findings that Clifford Henry Bowen was positively identified by two eye-witnesses as present at the scene of the crime and that no other person, including Lee Crowe, was seen at the scene of the crime. (Finding 3). Judge Naifeh further found that the two witnesses identified Clifford Henry Bowen

from a photographic array which included Lee Crowe and that both witnesses stated that Lee Crowe was not the individual whom they had seen on the night of the triple homicide. (Findings 4 and 5). Judge Naifeh further found that both witnesses positively identified Clifford Henry Bowen at an in person lineup. (Finding 6). Judge Naifeh further found that the police were aware that Crowe was a suspect but discredited the lead after an intensive investigation lead to the identification of Clifford Henry Bowen by the two eye-witnesses. (Finding 7). Judge Naifeh found that the police were aware that Lee Crowe was in the State of Oklahoma at the time of the triple homicide, but that there was no showing that he participated in the offense. (Finding 8).

Importantly, the two women who identified Clifford Henry Bowen from the photographic array did so independently,

one in Oklahoma and the other in California. Neither woman had a motive to lie and the preceptions and recollections of both were subject to cross-examination at trial. These findings of basic historical fact were unchallenged by Mr. Bowen and ignored by the federal courts below. Taken together, these findings of historical fact, entitled to a presumption of correctness pursuant to 28 U.S.C. § 2254(d), compell the conclusion that Clifford Henry Bowen, not Lee Crowe, was present in Oklahoma City at the scene of the triple murders and committed those murders. No one, even to this date, has placed Lee Crowe any closer to the scene of the crimes than the Madill, Oklahoma area, approximately 130 miles away. Only by ignoring these inconvenient findings of facts could the federal courts below come to the conclusion they desired.

B. THE LEE CROWE INFORMATION IS NOT EXCULPATORY.

The error of the court below, devastating to the administration of criminal justice in the Tenth Circuit, was to focus on the usefulness of the Lee Crowe material at trial instead of focusing on its affect on the truth and justice of the finding of Clifford Henry Bowen's guilt. This Court has stated that the three elements of a violation of Brady v. Maryland, 373 U.S. 83, 87 (1963), are the suppression by the prosecution after the request by the defense, the character of the evidence for the defense, and the materiality of the evidence. Moore v. Illinois, 408 U.S. 786, 794-95 (1972). The court below paid only lip service to the clear pronouncements of this court that, in considering exculpatory evidence, our overriding concern is with the justice of the finding of guilt. United States v.

Bagley, 473 U.S. ___, 87 L.Ed.2d 481, 491 (1985); United States v. Agurs, 427 U.S. 97, 112 (1976). Indeed, the court below adopted a theory expressly rejected by this Court in Agurs. In Agurs, the court rejected as unacceptable for determining the materality of Brady material the standard of the impact of the undisclosed evidence on the defendants ability to prepare for trial, rather than materality of the evidence to the issue of guilt or innocence. Agurs, supra, 427 U.S. at 112 n. 20. As discussed below, the Court over our objections, relied precisely upon the standard rejected by this court in Agurs to decide the present case.

A proper resolution of the issues in this case may be found by relying upon Moore v. Illinois, 408 U.S. 786 (1972). In that case, this Court dealt with a Brady question in which one witness, Sanders, had informed police that a man known to him as "Slick" had told him that

he had recently shot a bartender in Lansing, Illinois, the scene of the murder in question. Id. 408 U.S. at 789. Moore, and not "Slick", was the defendant charged with the murder. Moore raised an alibi defense that he was working as a waiter in a country club in another city at the time of the shooting. Id. 408 U.S. at 790. Records at the country club indicated that the defendant had been paid for working that night and defense witnesses testified that they would have known if he had been absent for any substantial period of time. Id. 408 U.S. at 791. Records of the club also indicated that the defendant had been working at the country club at the same time prosecution witnesses testified he was elsewhere making inculpatory statements. Id. 408 U.S. at 791. The police attempted without success to locate the suspect "Slick." Id. 408 U.S. at 793. Further, the witness Sanders who

had identified "Slick" told police officers that "Slick" was thirty to forty pounds heavier than defendant Moore and did not wear eyeglasses. Id. 408 U.S. at 793. Moore argued that the failure of the prosecution to inform him of Sanders identification of "Slick" as the man making the statement regarding shooting a bartender was exculpatory within the meaning of Brady, supra.

In ruling against Moore's claim of exculpatory evidence, this Court stated:

> We know of no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. Here, the elusive "Slick" was an early lead the police abandoned when eyewitnesses to the killing and witnesses to Moore's presence at the Ponderosa were found.

Id. 408 U.S. at 795. In that case the Court went on to state:

> None of the five items serves to impeach in any way the positive identification by Hill and by

> Powell of Moore as Zitek's killer, or the testimony of Fair and Joyce that Moore was at the Ponderosa Tap on April 27, or the testimony of Fair that the moustached Barbee was accompanying Moore at that time, and that one of the two men made the additional and undisputed admission on the ride to Harvey. We conclude, in the light of all the evidence, that Sanders' misidentification of Moore as Slick was not material to the issue of guilt.

Id. 408 U.S. at 796-97. Because the two scene witnesses who had identified Clifford Henry Bowen as being the man at the scene of the triple murders had rejected Lee Crowe in a photo lineup and had positively identified Bowen at an in-person lineup, we believe the opinion of the court below amounts to an explicit rejection of this Court's teaching in Moore v. Illinois, supra. The result of the ruling below will require prosecutors to reveal information on rejected suspects even when it clearly appears, as found by Judge Naifeh herein, that those suspects were not involved in the crimes.

That result will in turn create a premium on the ability of defense counsel to mislead juries, even after the fact, rather than on the proper emphasis on the guilt or innocence of an accused.

The court below expressly recognized this court's admonition that the inquiry is grounded in an overriding concerning with the justice of the finding of guilt. Bowen v. Maynard, No. 86-1136, sl. op. at 44 (10th Cir. June 25, 1986). However, the court below did not even bother to argue away Judge Naifeh's unchallenged findings of historical fact that Clifford Henry Bowen, and only Clifford Henry Bowen, was positively identified at the scene of the murders. It simply ignored those findings or, at most, considered them as argument presented by the state rather than presumptively correct findings of fact of a state court. Then, the Court went onto hypothesize the motives of Lee Crowe to murder the

victims. Id. slip op. at 45. The court below went so far as to state that Lee Crowe had "a distinct opportunity to commit the murders" when all the evidence, and the only evidence, as well as Judge Naifeh's findings of fact, indicate that Clifford Henry Bowen, not Lee Crowe, was present at the scene of the murders. Id., slip op. at 46. If Lee Crowe had "a distinct opportunity to commit the murders" that opportunity occurred from a range of 130 miles from the scene of the crimes, because no one, to this date, has placed him any closer to the murders than that distance. The court below further found that Lee Crowe had the ability to commit the murders. Id. slip op. at 47. Next the court criticized the investigation leading to Mr. Bowen's arrest and stated how, with the Lee Crowe material, "a defense lawyer of less than heroic skill" could have

theorized why the state charged Bowen rather than Crowe. Id. slip op. at 47-48.

All this was done by ignoring unchallenged and presumptively correct findings of fact by the state court which would render the court below's imaginative treatment of Lee Crowe impossible. Because Judge Naifeh found that the witnesses positively identified Clifford Henry Bowen, rather than Lee Crowe, on the scene of the murder and that Lee Crowe was not present there, the treatment of Lee Crowe by the Tenth Circuit becomes speculation of the worst sort, in flat disregard of the congressional mandate of 28 U.S.C. §2254(d).

The court below erred, and erred seriously, when it ignored Judge Naifeh's inconvenient findings of fact and affirmed the writ by finding a duty to disclose, even without a request, information regarding a discarded

suspect, because the defense could find that information useful at trial where the information does nothing to cast doubt on the justice of the finding of guilt of Clifford Henry Bowen. The effect of that error is to require disclosure of discarded suspects by prosecutors in the Tenth Circuit whenever that information could supposedly be used to impeach anyone, regardless of whether or not that information is favorable to the defense on the issue of guilt or punishment. This result departs seriously from this court's pronouncements on what is material exculpatory evidence and renders criminal convictions in the Tenth Circuit infirm for reasons having nothing to do with the justice of findings of guilt or the appropriateness of punishment in those states of the Tenth Circuit. We respectfully urge the Court to grant the writ and reverse the judgment below.

PROPOSITION II

EVEN ASSUMING THE LEE CROWE MATERIAL WAS EXCULPATORY IN THE LEAST, THE COURTS BELOW GAVE INADEQUATE DEFERENCE TO STATE COURT FINDINGS OF FACT THAT THERE HAVE BEEN NO REQUEST FOR INFORMATION ON OTHER SUSPECTS.

A. TREATMENT OF STATE COURT FINDINGS OF FACT

The original state trial judge, the Honorable Raymond Naifeh, after special hearing, found that the information regarding Lee Crowe could have been discovered through the exercise of due diligence as the defendant could have requested a list of all suspects prior to trial but failed to do so. (Naifeh Finding 28). The Oklahoma Court of Criminal Appeals found that no request was made for exculpatory evidence prior to trial. Bowen v. State, 715 P.2d 1093, 1098 (Okla.Crim.App.1984). In discussing Judge Naifeh's findings, the Court of Criminal Appeals affirmed that the state

trial court found that information regarding Crowe could have been discovered through the exercise of due diligence by requesting a list of suspects prior to trial, but the defense failed to do so. Id. 715 P.2d at 1103. In the same passage, the Oklahoma Court of Criminal Appeals stated that Mr. Bowen had failed to show under what theory of evidence the Lee Crowe material would have been admissible and that the mere possibility of an item of undisclosed information might have helped the defense or affected the outcome of the trial does not establish materiality. Id. 715 P.2d at 1103.

The federal trial judge, the Honorable Thomas R. Brett, understood that Judge Naifeh had made a specific finding that there was no oral request. (Transcript p. 15, proceedings on hearing on Motion to Stay, January 23, 1986). However, Judge Brett went on to conclude

that the state had conceded there had been such a request. Id. p. 15. This conclusion was incorrect and has been vigorously contested since that time. First, in closing arguments before the federal district court had ruled, undersigned counsel stated that our view was and continued to be that there had been no such request. (Transcript 50-51 of hearing of October 17, 1985). The first proposition in our Proposed Findings of Fact and Conclusions of Law in the federal district court, running three pages, was that Judge Naifeh's Findings of Fact were presumed correct under 28 U.S.C. § 2254(d). Our third proposition in those Findings of Fact and Conclusions of Law, dealing with the Brady question, began as follows:

> During the evidentiary hearing on Petitioner's second motion for new trial in the state court the Honorable Raymond Naifeh prepared Findings of Fact and Conclusions of Law.

> Because the Petitioner has failed to meet the requirements of 28 U.S.C. § 2254(d), this Court adopts Judge Naifeh's findings of fact and presumes them correct. Judge Naifeh's finding No. 38, with subparts A through S may be found at pages 6 and 7 of his Findings of Fact and Conclusions of Law which are attached hereto and adopted with regard to the findings of fact.

Respondent's Proposed Findings of Fact and Conclusions of Law, November 25, 1985, at 31. Two pages later in those Proposed Findings of Fact and Conclusions of Law, we rather inartfully dealt with the alleged oral request arguing that it was legally inadequate out of a fear that Judge Brett might find Judge Naifeh's Findings of Fact were not adequately supported by the record. 28 U.S.C. § 2254(d)(8). It was this latter language which the court below siezed upon to support its conclusion that we had conceded the existence of an oral question. This was done by ignoring our

repeated invocation of Judge Naifeh's findings and in spite of the fact that Judge Brett essentially took no testimony not also given before Judge Naifeh. Despite the clear language of Judge Naifeh's Findings of Fact, the opinion of the Oklahoma Court of Criminal Appeals, and federal Judge Brett's recognition that Judge Naifeh had found no oral request, the court below stated that it was unclear whether either the state trial court or the Court of Criminal Appeals implicitly decided that no informal oral request had been made. Bowen v. Maynard, No. 86-1136 slip op. at 28 (10th Cir., June 25, 1986). The court below did recognize that if either state court did find that no request had been made this would be a finding of historical fact entitled to a presumption of correctness by federal courts under 28 U.S.C. § 2254(d). Id. slip op. at 28. The court below concluded that the state had

conceded an oral request regarding suspects even in spite of its recognition that undersigned counsel had contradicted this "concession" in closing argument by stating that "our view is and continues to be at this point that there was no request." Id. at 31. The court below bolstered this conclusion by overlooking our reliance on Judge Naifeh's findings in our lower federal court Findings of Fact and Conclusion of Law two pages before our inartful discussion of the alleged oral request, discussed above. See Id. at 31-32. Finally and surprisingly, the court below found that the "concession" constituted the state's "admission" that the state court determination was erroneous to the extent that it could be interpreted to mean that no oral request was made. Id. at 38.

B. EFFECT OF THE ERROR BELOW

Thus, the court below concluded that the state had "admitted" that Judge

Naifeh's Findings of Fact were erroneous even while we repeatedly and insistently relied on those same Findings of Fact as correct to support our position. This unsupportable conclusion regarding the alleged concession was required because Mr. Bowen made no attempt to deal with the requirements of Sumner v. Mata, 449 U.S. 539 (1981), while we had consistently argued the correctness of the state court Findings of Fact. See Bowen v. Maynard, No. 86-1136 slip op. at 26 (10th Cir., June 25, 1986). Ironically, we relied in the federal district court on the requirements of 28 U.S.C. § 2254(d) and Sumner v. Mata, 449 U.S. at 550, requiring a habeas corpus court to find one of the seven specific statutory reasons or that state court Findings of Fact were not supported in the record before rejecting those findings. Rather than finding one of those reasons, the federal trial court

found that we had conceded as incorrect one of the facts found in the state court findings upon which we relied. The federal district court did not include in its opinion its reason to conclude that any of the statutory factors from § 2254(d) was present as required by Sumner. Id. 449 U.S. at 551. The Tenth Circuit justified this failure to follow the requirements of Sumner and of the habeas corpus statute by converting our position into a "concession" that the state court findings we had always advanced a right were in fact wrong.

We expect the district court and the court below would not have gone to such trouble to misconstrue our position had those courts been completely secure in their conclusion that the Lee Crowe material was so exculpatory it created a reasonable doubt that did not otherwise exist and therefore should have been disclosed even without a request. Bowen

v. Maynard, No. 86-1136, slip op. at 49 (10th Cir., June 25, 1986). It is hard to compare the Lee Crowe material, especially in light of Judge Naifeh's findings, with the prototype of evidence that is of such substantial value to the defense that elementary fairness requires its disclosure even without specific requests as set out in Agurs, that is, fingerprint evidence demonstrating that the defendant could not have fired the fatal shot. United States v. Agurs, 427 U.S. at 110 n. 18. The Lee Crowe material simply fails to meet that high standard of materiality because in no way does it indicate that Clifford Henry Bowen did not commit the three murders for which he was convicted.

Therefore, the federal courts below were required to go to great lengths to create circumstances under which the higher Agurs standard for a specific request applied. That standard

of materiality, of course, is that the supressed evidence "might have affected the outcome of the trial." Agurs, 427 U.S. at 104.

The court below could understandably feel more comfortable with the conclusion that the Lee Crowe material might have affected the outcome of the trial based upon its apparent understanding of Brady that exculpatory evidence is evidence which could be helpful to the defense. Certainly the Lee Crowe material could have been helpful to the defense at trial. However, as shown above, the Lee Crowe material does nothing to detract from the guilt of Clifford Henry Bowen. Thus, it appears that the Tenth Circuit struggled mightily to convert our position into a "concession" in order to meet the higher Agurs standard of materiality and justify freeing Mr. Bowen while virtually convicting Lee Crowe in abstentia. We

respectfully suggest that this court should grant certiorari to review the proceedings in this case and to exercise this Court's jurisdiction to correct the profound errors in the opinion below which will only serve to further cripple law enforcement in the Tenth Circuit.

CONCLUSION

The federal courts below have released a convicted triple murderer, by making two separate and serious errors respecting state court findings of fact presumed correct under 28 U.S.C. § 2254(d) and by making an even more serious error in their reading of Brady and its progeny.

First, the courts below ignored uncontested findings of fact indicating that the Defendant, Clifford Henry Bowen, and not Lee Crowe, the discarded suspect, was the only man positively identified at the murder scene. There was no showing

even today, that Lee Crowe was even in the same city at the time of the murders or participated therein.

Next, because Mr. Bowen failed to address the requirements of Sumner v. Mata, the federal courts converted our constant reliance on state court findings of fact into an "admission" those findings were wrong and that Mr. Bowen's counsel had made an oral request for exculpatory information. The alleged "concession" of counsel results in granting relief on virtually the same evidence in the record when this Court denied Mr. Bowen's request for certiorari after direct appeal. Discarding these state findings of fact only increases impermissably the friction between the state and federal courts which Congress sought to reduce with 28 U.S.C. § 2254(d).

Finally, the federal courts below

with the justice of the finding of guilt into a license to set aside fairly won convictions because information about a discarded suspect might have helped the defense, even though it in no way indicates the defendant is not guilty. Countless convictions in the Tenth Circuit are now subject to Brady attack even though no evidence material to guilt or punishment may have been withheld. This Court's opinion in Moore v. Illinois has been effectively overruled in the Tenth Circuit and only complete disclosure can satisfy the standard adopted by the Tenth Circuit.

In order to restore the proper balance between state and federal courts under 28 U.S.C. § 2254(d) and to return the Brady doctrine to its rightful and beneficial place in the Tenth Circuit, we respectfully ask this Court to grant the

writ of certiorari and reverse the judgment of the court below.

Respectfully submitted,

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